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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1832

JULIUS T. CUYLER, SUPERINTENDENT
and
DISTRICT ATTORNEY OF PHILADELPHIA,
Petitioner,

v.

JOHN SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

This Court granted certiorari to review the judgment of the Third Circuit which issued a writ of habeas corpus because John Sullivan's Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated in this case, which concerns his conviction of

two capital offenses. The Third Circuit predicated its decision upon actual conflicts of interest and prejudice occasioned by the representation of respondent by two attorneys who also represented two co-defendants.

The Third Circuit's opinion catalogues these prejudicial conflicts of interest and rules that the record does not warrant a finding that this dual representation "raised no possibility of prejudice or conflict of interest, however remote" under the case law of the Circuit. In so doing the Third Circuit reversed both the District Court's denial of the writ, which the United States magistrate had recommended issue, and the rationale of the Pennsylvania Supreme Court that there was no dual representation.[1]

The decision of the Third Circuit was based upon the record evidence at trial in 1967 and post-conviction proceedings in 1975 in the state court which demonstrated a pattern of conflicts beginning with the retention of the two attorneys by the two co-defendants, who offered the services of their attorneys to respondent without fee, and extended to ongoing conflicts in the carrying out of a joint investigation for all three, in mapping strategy for a unified defense, in the joint preparation for trial between and among the three defendants, the two attorneys, and the investigator. The Third Circuit concluded that *both* attorneys represented respondent as well as his two co-defendants, a fact which petitioner herein does not now contest, and that they viewed themselves as a defense "team" for all three defendants. The Court also concluded that independent counsel unburdened by conflicting interests may have chosen and carried out a different trial strategy for respondent, and exampled specific instances of conflict in supporting its conclusion.

[1]Petitioner's allegation that the Third Circuit rested its decision upon a finding of a *potential* conflict is a misstatement, as is petitioner's allegation that the Third Circuit overruled the Pennsylvania Supreme Court's finding that there was no conflict of interest. The Pennsylvania Supreme Court held that the record did not demonstrate dual representation by the two attorneys, and therefore did not resolve the conflict issues upon which respondent herein prevailed in the Third Circuit.

Among these instances is the critical decision to rest the case without presenting respondent's testimony or any other evidence on his behalf; failure to call three exculpatory witnesses who were on the scene at the time the crimes were committed, because the witnesses (according to one of the attorneys' testimony) might have testified they saw either of the other two defendants leaving the scene; and the failure to introduce evidence so as to guard it from premature disclosure as a protective measure for the two co-defendants yet untried. The Third Circuit rested its decision upon still another demonstration of conflict of interest where the truthfulness of the government's star witness could be refuted only by calling a co-defendant to whom the two lawyers owed conflicting duties: 1) protection from possible self-incrimination, 2) premature exposure of defense evidence, as well as 3) a death speech obligation to each individual defendant should a first degree conviction result.

The factual context of this case which resulted in such joint representation by attorneys who embarked upon an advocacy road, burdened by actual and possible conflicts at every turning point, is as follows:

The three defendants, including respondent, were

arrested on November 3, 1966, and each was charged with two counts of murder and conspiracy in connection with the deaths of business agent John Gorey and Rita Janda on June 17, 1966 inside the headquarters of Local 107, Teamsters Union at Broad and Spring Garden Streets in Philadelphia. Respondent John Sullivan also was a business agent for the local. Co-defendant Gregory Carchidi was a janitor also employed by the Union. The inquest into the deaths was scheduled for November 3, 1966, and respondent was among numerous witnesses subpoenaed to testify in that proceeding. He engaged counsel to represent him and it is uncontradicted that this attorney did not represent him beyond November 3, 1966, Mr. Sullivan was arrested at this inquest hearing.

The circumstances of his further encounter with counsel in this case are of sufficient importance to the next thirteen years of Mr. Sullivan's life to warrant some factual attention.

He was held without bail on two murder charges, as were the other two co-defendants Carchidi and DePasquale. After indictment he wanted to engage his former attorney to represent him at trial, but lacked funds. The two other defendants told him they had engaged Mr. Peruto and his "partner" (Mr. DiBona was not then identified by name), and that they would handle the whole case. Respondent agreed to go along.[2]

[2] [By Mrs. Gelb:]

"Q. Thank you. Now I take it then that at no time after November 3, 1966, were you represented by Mr. John Patrick Walsh. Is that a correct statement?
"A. That is correct.
Q. Now did there come a time after that date when you had engaged in other counsel?

footnote continued

footnote continued from preceeding page

A. Yes, ma'am.
Q. Do you have any recollection of when that was?
A. It's sometime in December.
Q. And who are the attorneys that you engaged?"
A. Mr. G. Fred DiBona and A. Charles Peruto."

[By The Court:]

"Now when you say December, you mean 1966?"

[The Witness, John Sullivan:]

"Yes, sir."

[By Mrs. Gelb:]

"Q. And that was apparently subsequent to your indictment. And I may state for the record that the Bills of Indictment indicate that the Bills were returned on November 14, 1966. Taking that as a focal point, Mr. Sullivan, you retained Mr. DiBona and Mr. Peruto subsequent to November 14, 1966; is that correct?
"A. That's correct.
Q. Will you tell the Court the circumstances of your retaining these attorneys to represent you.
A. Yes. Well, as I was arrested with two other fellows, and we discussed the matter, and I had told them that my preference was to hire Mr. Walsh to handle my case. I said the only problem was that I didn't have the money sufficient enough to pay Mr. Walsh. And it was brought out to me by the other two fellows that they had something to do with Mr. Peruto and that Mr. Peruto and his partner, which they didn't name at the time, would handle the case and handle the whole three of us. And I agreed to go along with this.
Q. Did you at any time pay Mr. DiBona or Mr. Peruto to represent you?
A. I did not.
Q. Did you at any time ask them to represent you personally?
A. Well, it was a foregone conclusion after they arrived to visit us at the prison.
Q. Did you make the contact to ask them to come visit you?
A. I did not, no.
Q. To your knowledge did anybody, any member of your family pay any counsel fees to Mr. Peruto or to Mr. DiBona?"
A. Not to my knowledge." *(A. 82a-84a).*

An actual joint representation was established during this pretrial period during which A. Charles Peruto and G. Fred DiBona provided representation for the three defendants. The two attorneys entered their appearances on behalf of their three clients, and thereafter they consulted jointly with them at the prison, adding from time to time an investigator to their team who also consulted jointly. (A. 84a-85a). During the pretrial stage the attorneys made joint court appearances for their three clients (R., Trial, May 11, 1979) and in filing joint motions for discovery of weapons (R., Trial, May 17, 1979). On May 11, 1967, the cases were listed against all three defendant's before Judge Alexander F. Barbieri. After conferring with the attorneys for all three as to whether a joint trial could ensue, the assistant district attorney moved to trial against Sullivan only. (R., Trial, May 11, 1967, 2). As to what extent the conference with counsel informed that decision, the record is silent. The record is explicit, however, that both attorneys objected to the postponing of trial for their other two clients, and demanded on behalf of all three discovery of weapons and testing reports if any existed. (R., Trial, May 11, 1967, 10).

In the three months prior to the call of the Sullivan case to trial, the lawyers for the three defendants represented them jointly. The record is uncontradicted that they mounted a unified defense, employing a single investigator, William Cristine, on behalf of all three. (A. 84a-85a). As to each defendant, the two attorneys owed a duty of protection from possible self-incrimination. As to each defendant, the two attorneys owed an obligation to guard zealously every iota of evidence from premature exposure. As to each defendant, they

owed undivided loyalty and a devotion to maximize any element of surprise which would aid his defense. They confronted tactical decisions of every nature and kind known to trial advocacy in this capital double murder case, and they embarked upon their path presumably knowing the nature and scope of the decisions they would have to make in their travels upon it.

When the case was called, DiBona opened to the jury by announcing he would show that there were a number of people in and about the building where the murders took place, who would discredit the upcoming testimony of the Commonwealth's star witness, McGrath. He said McGrath had given totally conflicting accounts of the events of June 17 to a Union official named Michael Hession. (R., Trial, 90-91).

John Sullivan was also a business agent for the Union. McGrath, a janitor, testified he arrived at the local's office building at about 6:00 P.M. In the course of cleaning the building Mr. Sullivan asked him why he was cleaning on Friday, which was McGrath's day off, and suggested that he defer his cleaning duties. A credit union meeting was about to take place that very evening, and a union meeting was scheduled for Sunday. After John Gorey and Rita Janda arrived in the building, Gorey as well had a conversation with the janitor that related to his cleaning responsibilities. At some time another janitor, who was later to be a co-defendant, Carchidi, also suggested that McGrath

defer his cleaning duties because of the upcoming meetings. While McGrath and Carchidi were talking together, Sullivan left the conference room, and the record reflects that no evidence whatever placed him in that room again, nor was there ever any record evidence that Mr. Sullivan ever entered John Gorey's office. McGrath said he heard what sounded to him like firecrackers going off, and McGrath was permitted to testify over defense objection that he then asked Carchidi "What was that?" and Carchidi replied "Get out of the building and don't say nothing." (R., Trial, 844).

McGrath did in fact leave the building in a hurry. He testified in fulfillment of DiBona's prophecy that he (McGrath) saw three people standing outside under Gorey's window, and he stopped to speak to one of them whom he knew by name, Nicholas Franks. (R., Trial, 839-840). He said someone named John Sheltz and a woman whose name he did not know were outside shortly before. (R., Trial, 812). He agreed that he had told Michael Hession varying accounts of what happened on June 17, and acknowledged Hession was the person to whom he owed his present job. (R., Trial 733, 7470752). McGrath later returned to cover up evidence that he had ever been in the building, then departed again, without looking into or checking any of the rooms.

The bodies of Gorey and Janda were found the next morning in Gorey's second floor office. No eyewitness evidence nor weapons nor any other physical evidence was offered to prove Sullivan had ever been in Gorey's office the evening he and Janda met their deaths.

Despite the fact DiBona had opened his case with a promise to produce three persons who were outside

Gorey's office "window" on June 17, and at the very least intimated he would in addition produce a witness, Michael Hession, who would also contradict McGrath, Peruto rested the defense without putting on evidence. DiBona made the closing argument, once again calling attention to the three "missing" witnesses, thereby inviting the district attorney to argue, as he did, that these witnesses were available to the defense. The jury found respondent guilty of both murder charges on June 18, 1967. (R., Trial, 1170-1171).

Under the Pennsylvania rule requiring bifurcated proceedings, Peruto then argued to the jury against imposition of death penalties, the jury selecting life imprisonment.

The attorneys filed post-verdict motions, meanwhile preparing for the upcoming trials of the two co-defendants. On October 25, 1967, although neither attorney had filed a brief in support of post-verdict motions (R., Trial, October 25, 1967, 2), the motions were argued orally before a three judge court *en banc*. On July 15, 1968 the motions were denied 2-1, with Judge (now President Judge) Bradley voting for the grant of a new trial.

The trial judge pronounced consecutive sentences of life imprisonment on August 9, 1968, and on September 10, 1968 DiBona and Peruto filed notices of appeal to the Supreme Court of Pennsylvania. Following respondent's convictions, the other two co-defendants went to trial and were acquitted.

Respondent was later to argue successfully in post-conviction proceedings that his counsel was appointed to the bench of the Court of Common Pleas of Philadelphia during the pendency of the appeals, and the remaining

attorney, Peruto, testified in post-conviction proceedings he never filed a brief nor argued this case in the Supreme Court of Pennsylvania.[3] It was during this period that respondent filed *pro se* a brief in opposition to that filed by the Commonwealth in the Supreme Court of Pennsylvania, and launched his first *pro se* petition for habeas corpus in the District Court on the theory that his attorney had abandoned him for political aspirations and had failed to brief or argue his cases in the Supreme Court. A second habeas corpus petition was also denied on similar grounds.[4] On December 29, 1971, three and a half years after the appeals were docketed, the Supreme Court of Pennsylvania handed down its plurality opinion, splitting 3-3 on the issue of the sufficiency of the evidence to sustain the verdicts, thereby affirming judgments of sentence of the lower court. A petition for reargument by present counsel, who serves *pro bono*, was filed and was refused. Post-conviction proceedings were undertaken on numerous grounds including the ground of conflicting interests resulting in ineffective assistance of counsel, which is presently before this Court, as well as

[3]Mr. Peruto said in response to this question in post-conviction proceedings: "I never did anything for John Sullivan, which will go down to the day I die, because I, too, felt that it was the worst case in my life of an unfair conviction." (A. 45a).

[4]*United States ex rel. Sullivan v. Rundle*, No. 69-244 (E.D. Pa. June 12, 1969) and *United States ex rel. Sullivan v. Rundle*, No. 69-452 (E.D. Pa., September 17, 1969), *certificate of probable cause denied*, misc. No. 1377 (3rd Cir., December 31, 1969), were dismissed because petitioner's direct appeal was still pending. *United States ex rel. Sullivan v. Johnson*, Civil Action No. 73-1694 (E.D. Pa., September 11, 1973), was dismissed for failure to exhaust state remedies.

the denial of respondent's *Douglas* rights. (*Douglas v. California*, 372 U.S. 353 (1963).) On November 6, 1974, the post-conviction court after numerous hearings granted respondent the right to take a direct appeal to the Supreme Court of Pennsylvania upon a factual determination that Peruto and DiBona rendered ineffective assistance in the appellate process.

The claim of ineffective assistance on appeal was affirmed by the Supreme Court of Pennsylvania, which agreed that the grant of a new appeal was proper. However, the Supreme Court this time split somewhat differently on the issue of the sufficiency of the evidence. Justice (now Chief Justice) Eagan, who had in respondent's first appeal found the evidence insufficient, now noted with four other justices that the same evidence was sufficient, with only Justice Roberts and the late Justice Manderino dissenting. The Supreme Court refused to grant relief on the issue which is before this Court, because it concluded there was no dual representation in the representation of respondent by DiBona and Peruto.

Respondent then filed a petition for writ of habeas corpus, which resulted in a report and recommendations by United States Magistrate Edwin E. Naythons recommending a writ issue on the ground of conflicting loyalties of counsel. The United States District Court overruled the magistrate and denied the writ. An appeal was prosecuted to the Third Circuit and after briefing and argument before Judges Ruggero J. Aldisert and James Hunter, III of the Third Circuit, with District Judge John B. Gerry of New Jersey sitting by designa-

tion, the Third Circuit reversed and remanded in an opinion joined by all three judges. Rehearing *en banc* was denied, the three judges dissenting. Certiorari was granted by this Court.

SUMMARY OF ARGUMENT

I.

The record of respondent's case demonstrates from the initiation of pretrial preparation to the appellate stage, a conflict of interest between respondent and his other two co-defendants, all of whom were jointly represented, said conflicts influencing the judgment of counsel. At no time was any mention of a waiver of any such conflict ever broached by the trial court to either counsel or the respondent.

The Third Circuit made a careful review of the entire record, and concluded, although not necessary to its decision, that respondent's counsel were burdened by several conflicts of interest which resulted in prejudice.

Contrary to petitioner's assertions, the existence of these conflicts was apparent from the initiation of the dual or joint representation, and continued unabated throughout the proceedings against respondent.

Further, these conflicts were fully developed on the record which disclosed: 1) a failure to call exculpatory witnesses at the 1967 trial on behalf of respondent, 2) a conflict between a co-defendant's Fifth Amendment privilege and the right of the respondent to call

witnesses in his own behalf, 3) a strategy at respondent's trial not to prematurely disclose defense evidence for the benefit of the two then untried co-defendants, and 4) an explicit perception of divided loyalties on the part of one trial counsel.

The Commonwealth of Pennsylvania became the illegitimate beneficiary of these conflicting interests, and the Third Circuit properly found that independent trial counsel may well have utilized other strategy.

II.

The standard applied in the Third Circuit to conflicts of interest for Sixth and Fourteenth Amendment purposes is in fundamental agreement with six other circuits. The Third Circuit standard requiring a showing of prejudice or conflict, however remote, is not the equivalent of a rule that joint representation is per se a violation of the Sixth Amendment.

In the case of a silent record, where no waiver of the right to be effectively represented occurred at trial level, the burden of proof should be on the Commonwealth to show that joint representation did not result in a Sixth Amendment violation or was unlikely to do so.

This standard is the framework for appellate review of an asserted claim of Sixth Amendment violation by reason of conflicts where the record is silent as to any intelligent waiver thereof.

The Third Circuit's standard is in essential agreement with the standards employed in the First, Second, Fourth, Seventh and Eighth Circuits. Only the D.C. Circuit may be said to employ a per se rule in the review of conflict of interest cases. Moreover, the result reached by the Third Circuit in the instant case was predicated on facts which would have compelled relief in any circuit, for the conflict was clear, actual and prejudicial. The distinctions urged by the petitioner relate to the language of the standard employed, and not to the facts of the case under scrutiny. Such a semantic distinction cannot be the basis of a conflict among the circuits, where any circuit would have granted the relief found appropriate by the Third Circuit.

III.

State action, for Fourteenth Amendment purposes, is present in this case, as in every criminal case, by the state's imposition of judgment depriving respondent of liberty for the rest of his natural life. The only question arguably remaining is whether the Sixth Amendment standing alone, imposes a requirement of official action as a prerequisite to the type of relief granted by the Third Circuit.

The language of the Amendment itself ["the accused shall enjoy . . . the Assistance of Counsel"] requires an opposite construction. The meaning of the command does not limit itself to deprivations which have an

official component. Additionally, the monopolistic control by the state over the qualifications and discipline of lawyers suggests that official action is always present where the duties of lawyers to clients are concerned.

The distinction between retained and appointed lawyers urged by the petitioners is one which this Court has rejected consistently, most recently in *Ferri v. Ackerman*, ____ U.S. ____ (No. 78-5981, decided December 4, 1979). Official action is implicated in the state's duty to provide for criminal defendants, who have no choice but to participate, a fundamentally fair trial. The court, the prosecution, and the defense all hold the constitutional office which effectuates that guarantee. Retained attorneys, just as court appointed ones, accept that office when they undertake representation of a criminal defendant.

IV.

The Third Circuit made use of the record developed in the state courts, and did not engage in *de novo* fact finding, nor violate the limits of appeallate review. The standards utilized in determining the existence of conflict were necessarily federal standards, which the Third Circuit was under a duty to apply.

The mandate that federal courts study the record independently to determine whether or not state court conclusions are supported therein has been long established. See *Neil v. Biggers*, 409 U.S. 188 (1972); *Townsend v. Sain*, 372 U.S. 293 (1963). This is not the equivalent of fact finding, which was in this case unnecessary in the face of the complete record pre-

sented to the Third Circuit. None of the pertinent facts in that record were disputed in the Third Circuit which appropriately corrected an erroneous ruling concerning federal constitutional law, applying federal law to undisputed facts and drawing the legal conclusion that respondent's attorneys were burdened by conflicts of interest.

V.

The circumstances surrounding respondent's representation demonstrate the hazards occasioned to criminal defendants in cases of joint representation. Although it is not necessary to reach such a conclusion, it is suggested that no standard short of a prophylactic rule against joint representation adequately protects the constitutional right to effective assistance of counsel for citizens charged with a crime.

The courts cannot provide protection by conducting a waiver colloquy at trial level which infringes upon a defendant's Fifth Amendment privilege, against self-incrimination, the attorney-client privilege, and which exposes a defendant to a perjury charge if his response during the colloquy differs from trial testimony. The assertion that such a waiver protects a defendant presumes that he is aware of the right he is foregoing, a doubtful proposition. The *Johnson v. Zerbst*, 304 U.S. 458 (1938) standard of waiver will likely remain unmet.

Even if a waiver is effective, the result may be a fundamentally unfair trial apart from the waiver. Additionally, appellate review of a conflict of interest is incapable of disclosing what does not appear on the

record. Finally, application of ethical standards for the conduct of attorneys in cases of joint representation does not redress the harm done to the client.

The lack of appropriate control over and remedy of conflicts of interest requires the imposition of a ban on joint representation of criminal defendants, who run the risk of the penalty and suffer the consequences that conflicted representation entails.

ARGUMENT

I.

THE THIRD CIRCUIT'S ORDER GRANTING RESPONDENT'S WRIT OF HABEAS CORPUS WAS COMPELLED BY SUBSTANTIAL RECORD EVIDENCE OF ACTUAL CONFLICTS OF INTEREST AND PREJUDICE OCCASIONED BY THE JOINT REPRESENTATION OF RESPONDENT BY TWO ATTORNEYS WHO ALSO REPRESENTED TWO CO-DEFENDANTS.

In *Glasser v. United States*, 315 U.S. 60, (1942), this Court reversed a defendant's conviction because his attorney, while also representing a co-defendant, failed to provide the quality of legal assistance "untrammeled and unimpaired" by conflicts of interest which the Sixth Amendment compels. The conflict asserted by counsel at trial was that his representation of Glasser in his conspiracy trial, while also representing a co-defendant, may lead the jury to link the two unfairly. In holding that the attorney's failure to cross examine a witness whose testimony could inculpate Glasser, this Court credited the biblical aphorism:

> "No man can serve two masters; for either he will hate the one, and love the other; or else he will love the one and despise the other. . . ." Matthew 6:24

Since *Glasser* was decided appellate courts have given expression in varying language to standards for determining whether a conflict of interest was demonstrated, whether the reviewing court has secure grounds for concluding the conflict existed, whether a judge should be required affirmatively to inquire into the defendant's understanding of his right to conflict-free counsel, and what is the appropriate allocation of responsibility as between a judge and an attorney for facilitating "untrammeled and unimpaired" representation consistent with the Sixth and Fourteenth Amendments.

Where unlike the Glasser trial, counsel did not explicitly advise the trial court of the possibility of a conflict, the standard adopted by the Third Circuit for determining the existence of a conflict has been expressed as follows:

> "[R]epresentation of co-defendants by the same attorney is not tantamount to the denial of effective assistance of counsel guaranteed by the Sixth Amendment. There must be some showing of a possible conflict of interest or prejudice, however remote, before a court will find the dual representation constitutionally defective." *Walker v. United States*, 422 F.2d 374 (1970).

Moreover, when John Sullivan was tried on double murder charges arising out of the killing of two persons inside Local 107, Teamsters Union in 1966, he had a

constitutional right to demand of his attorneys not only that they exercise the customary skill and knowledge which commonly prevails in preparing and trying a case, but also that they do so unburdened by dividing their loyalties while meshed in conflicts of interest. *Moore v. United States*, 432 F.2d 730, 736 (1970); *United States ex rel. Green v. Rundle*, 434 F.2d 1112 (1970); *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3rd Cir. 1973). The Commonwealth of Pennsylvania's case against John Sullivan demonstrates from the initiation of pretrial representation to the appellate stage a consistent pattern of actual conflicts of interest as between respondent and the co-defendants, which influenced the judgments of his counsel. Both attorneys, concededly well known in Philadelphia regrettably gave short shrift to the outsider among the three co-defendants, the one who couldn't pay the bill, the one prejudiced by the guarding of evidence which upon later disclosure benefitted the others. In this case, where the evidence was wholly circumstantial and thin, the conflicts most assuredly tipped the scale in favor of the Commonwealth who became the illegitimate beneficiary of respondent's conflict-laden trial.

The Third Circuit made a careful examination of the entire record and concluded, although not necessary to its decision, that there was conflict of interest and even a showing of prejudice and that independent counsel might have made a difference in defense strategy.[5]

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[5] The Third Circuit correctly held that reasonable strategy engineered by a conflict-laden counsel is insufficient to withstand the plain fact that the conflict itself rendered counsel ineffective.

A. Actual conflict in the representation of the respondent by the lawyers who also represented his co-defendants began long before trial and unconstitutionally affected trial strategy.

As the Third Circuit found, a unified defense was mounted for the three defendants by the two attorneys. Conferences were held jointly among the five at the prison, and on some occasions were attended as well by the sole investigator retained by the two attorneys to investigate the case for their three clients. While the precise defense strategy cannot be reconstructed from the cold record, we can define "tips of icebergs"[6] which yield clues to larger underlying problems. For example, there is no record evidence whatever that Sullivan and DePasquale ever knew each other prior to their arrests. Both Peruto and DiBona during the course of the Sullivan trial made strenuous efforts to disassociate DePasquale from Sullivan. At one juncture for example Peruto argued to the court that the jury should be instructed that DePasquale was not even a co-defendant. (R., Trial 1101). Confidences DePasquale and Carchidi disclosed which required protection during the trial of Sullivan may well have influenced the trial strategy in Sullivan's case. Since Sullivan's defense that he was not in the building at the time the crimes were committed required his testimony to that effect, and he was never called, it is not speculative to suggest that the jury concluded by its verdict that Sullivan was there on the scene. The two attorneys' concern for the co-defendants informed their advice to Sullivan. Respondent had a right to know what a lawyer representing him alone would devise in the way of defense strategy. He had a

[6] *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967).

right to the assurance that his attorneys would exercise appropriate zeal to obtain his acquittal. Protection and guarding of the co-defendants and of evidence is inconsistent with these interests.[7]

No attorney can use the skill commensurate with even normal trial advocacy where actions or advice given to one client may possibly damage other clients or where inaction toward one client may possibly benefit another client. It is in this connection that the potential for conflict becomes the conflict.[8] Counsel for Sullivan owed him a responsibility to produce every iota of testimony and evidence which in their professional judgment would strengthen his defense; unfortunately the conflict lies in the fact that they also owed

[7] Absent a waiver it is difficult to see how the attorney's decision not to produce evidence in respondent's case so as to "save" it for the subsequent trials can ever be termed conflict-free and non-prejudicial. It must be stressed that it is the judgment of the trial attorney that is here burdened by a conflict and whenever such extraneous matters inform an attorney's judgment a prejudicial conflict is in existence.

[8] This is obviously what the Third Circuit held below when it ruled, at 522, "We believe that Peruto's testimony illustrates in the plainest possible terms the potential for conflict of interest." There is no way to read this portion of the opinion except that it must mean the potential that respondent's interests were inconsistent with those of Peruto's other two clients. It cannot mean that potentially Peruto's judgment was affected since it is uncontradicted and unchallenged in the Third Circuit that Peruto's judgment was *actually* affected due to the context of this case, where, as found by the Third Circuit, Peruto, if faithful to all three of his clients, would necessarily have to consider the "possibility" that actions or advice to one would or could injure others, or that inaction as to one could benefit others.

obligations to Carchidi and DePasquale at this same juncture not to tip their hand to the Commonwealth.

The very nature of trial advocacy is such that activity vital to trial must of necessity take place prior to trial. An investigation must be carried out; privileged conferences between lawyer and client must take place; legal advice is offered and discussed; trial strategy is charted. The right to counsel entails untrammeled and unimpaired assistance prior to trial, as well as in the course of trial. *Glasser v. United States, supra*, at 465; *United States ex rel. Hart v. Davenport, supra*, at 209; *Von Moltke v. Gillis*, 322 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1949); *Porter v. United States*, 298 F.2d 461, 464 (5th Cir. 1962).

B. Trial strategy reveals ongoing divided loyalties and failure to put on a defense in the face of respondent's request to call witnesses known to all parties whose testimony was directly relevant to the defense.

McGrath, the Commonwealth's chief witness testified he heard "firecrackers" at about 7:15 P.M. and left the union hall in a hurry Since he had already testified that upon removing some trash he had seen and spoken to two people in the parking lot nearby,[9] his departure following

[9] "Q. Now, you went back to a parking lot or a lot to burn some trash, it that right?

"A. I normally take the cans in the lot adjacent to the union hall and empty the can and burned it. Most of the time, I set them on fire.

Q. Well, now, specifically this night of June 17, you went down to a lot behind the 107, burned the trash or got rid of the trash somehow, is that right?

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the "firecrackers" was not too hurried to prevent his observing three additional persons and his conversing with one of them about money owed him and about a flat tire.[9a]

The heart of Sullivan's defense was that he did not kill Gorey and Janda, nor was he seen inside the building at the time the shots ("firecrackers") were fired. Mr. DiBona told the jury when he opened for Sullivan that he would show there were three witnesses nearby who did not hear shots when McGrath said they rang out. McGrath's subsequent testimony placing numerous witnesses in a position to hear what McGrath said he heard was directly relevant to Sullivan's defense that the noises did not occur when he was in the union

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A. That is right.

Q. And while you were down there, you had a conversation with someone, didn't you?

A. Well, not a conversation, Just a wave of the hand, and how you doing, or . . . I was that close to talking to one, John Sheltz.

Q. And whe else was there?

A. There was a woman there who owned this car. I don't know her. I know Johnnie Sheltz. He was one of my former stewards.

Q. And then you went back upstairs; is that correct?

A. Yes, sir.

Q. By the way, do you know that woman's name?"

A. No, I don't." (R. Trial, 811-812).

[9a] Contrary to petitioner's contention that no defense evidence which had any bearing upon guilt in fact existed (Pet.'s Brief, 20), the record demonstrates that the testimony of six witnesses (including respondent himself, Carchidi, Hession, and the three others present outside the victim's window), was available. Except for the defendants, the witnesses were under Commonwealth subpoena awaiting the crier's call to the witness stand. (R. Trial, 849-850; R. Trial, 1126-1127).

hall.[10] Indeed DiBona advanced this theory in closing argument as well. He said:

> "... All you have is the testimony of McGrath; that he heard firecrackers; that he heard what he thought were firecrackers at 7:15 P.M. You remember, members of the jury, that I pointed out on cross examination with Mr. Levy that three men were immediately in front of Gorey's office, not more than 9 or 10 feet from the office. McGrath is over at this end of the conference room (indicating) and if you make the measurements that I have, it's 75 or 80 feet. If McGrath hears these firecrackers from here, (indicating), is

[10] [By Mr. DiBona:]

"Q. We will leave that then, Mr. McGrath. Then you started driving east on Spring Garden; is that correct?

"A. After I come down the steps, I got in my car, went east on Spring Garden.

Q. And then you passed the three people standing on the sidewalk in front of the building; is that correct?

A. Well, I didn't actually pass them. I seen them standing on the side of the building, somewhere in the vicinity of Gorey's office. I mean, I wouldn't say they were standing right under the window. There were three people there. Two of them I knew and the other one I didn't.

Q. Did you have a conversation with one of them?

A. One of them I had a conversation with him.

Q. You testified yesterday that you had a conversation with ... sir, repeat the conversation

A. The conversation I had with Nicholas Franks pertained to stopping at Local 513 to pick up an envelope. I had loaned him some sound equipment that he used in an election, that he had there that had passed and he wanted to compensate me for it.

Q. That is all the conversation you had?"

A. Other than that, he informed me that I had a flat tire." (R. Trial, 849-850).

> there any doubt in anyone's mind that the three men standing outside of Gorey's window 9 or 10 feet away, did not hear it? Certainly, members of the jury, you must conclude that there is no doubt about it if such things did occur. Now, as to Martin and Frank and Ted, why did the Commonwealth not produce these three men? I suggest, members of the jury, his Honor will charge you of his failure to produce these three men. Is it that the Commonwealth knew that it would not be supporting testimony? You heard McGrath say that when he drove east on Spring Garden, he stopped and talked to these three men. If these noises had occurred at 7:15, would you not expect that the three men outside of the building would ask McGrath what were the noises, they did not. McGrath came out of the parking lot after leaving the building, and did he ask them what were the noises, no. They are talking about a flat tire and a lot of other matters, but there is no mention of the so-called noises. We submit, members of the jury, that *this noise did not occur at that hour.*" (R., Trial 1170-1171), (emphasis supplied.)

Of course Mr. Sullivan's two attorneys had already rested the case without putting on evidence. The record reflects the fact that the Commonwealth had these witnesses under subpoena. The assistant district attorney as well as both defense counsel knew who the witnesses were.

> "MR. PERUTO: Prior to Your Honor making a ruling, the Commonwealth had rested. Mr. Sprague had witnesses who were within ten feet of the place where the shooting is alleged to have happened. He saw people that could have been eye-witnesses and they were not called in here to testify. The Commonwealth has not called them. I ask that they be made available or have it put on

the record as to when the district attorney will have them available.

"THE COURT: I don't know who they are.

MR. PERUTO: Those three people."

THE COURT: Do you know who they are?"

"MR. SPRAGUE: *They are the people here under subpoena. Mr. Peruto knows that they were here.* They were here during the presentation and released to stand by for a phone call. The defense, as I stated yesterday, can subpoena whoever they want to come in and testify." (R. 1126-1127), emphasis supplied.

What interest of John Sullivan's was effectuated by a defense decision not to call these witnesses to refute McGrath? Defense counsel told the jury in opening and closing speeches of the presence of these persons. The assistant district attorney was invited by the defense to comment on failure to put on a defense, in particular to call these witnesses, and he did so. The trial judge even approved the assistant district attorney's speech to the jury in which he argued *these very witnesses were in the hallway available to the defense.*[11]

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[11]"THE COURT: My ruling is that you have a right to say that the witnesses are available, these witnesses that you have mentioned within your speech that you have failed to call." (R. Trial, 1184).

. . .

"MR. SPRAGUE: Now, members of the jury, before I was interrupted, I was stating and I repeat again, that these witnesses defense is talking about are right out there in the hallway, available to them. Members of the jury, when McGrath was on the stand and the defense said to him, 'Did you say that was the same story that you have to Michael Hession,' I don't know how many times this was asked over and over, but McGrath said that, 'sure, I did.' Hession was available to them and don't you think if they had anything contradictory wise to what McGrath said that they would have called him. . . ." (R. Trial, 1185).

At post-conviction proceedings Mr. Sullivan testified he heard his attorney tell the jury that three witnesses were under the window of Gorey's office at the time the shots were fired, and he wished to have these witnesses testify. (A., 103a-104a). He was told by counsel:

"They said there is no sense in putting anything on that may hurt the other two (co-defendants) because we've got this case won." (A. 106a).

Mr. Peruto's account is in agreement with Mr. Sullivan's; Mr. Peruto testified:

"Q. You had an investigator by the name of Bill Cristine investigate this case for you?

"A. Yes.

Q. Do you remember him submitting a report to you saying there were three witnesses outside the Local 107 Headquarters who did not hear any shots?

A. Yes.

Q. Did you advise the defendant Sullivan when you were considering whether or not to put on a defense that these three witnesses were available and could help this defense?

A. I don't recall advising him of that, but I do recall that I felt that it might be dangerous because *one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross-examination of those witnesses in Sullivan's case.*

Q. So it might have hurt one of the other defendants that you represented?"

A. Yes, sir. And there was a matter of judgment in the sense that we felt that the only thing that they had was the mere statement of McGrath and that the case would not even go to the jury." (A. 63a-64a), (emphasis supplied.)

Judge DiBona testified there was no "real good evidence" the defense had (aside from respondent's testimony, about which more will be noted). (A. 22a). However, his recollection is at variance with the trial record, which demonstrates that at the close of the Commonwealth's case he asked the assistant district attorney to have these witnesses under subpoena to remain subject to call. He said:

> "... nor do we know that they would not call witnesses to the witness stand *including people whose testimony would have appeared to have been vital to the Commonwealth's case*, but apparently adverse to their position, including three people who were standing there at the time these firecrackers went off." (R., Trial 1085), (emphasis supplied.)

Respondent was advised by his two lawyers that three witnesses who were under the Commonwealth of Pennsylvania's subpoenas during the course of his trial would refute McGrath's testimony that the lethal shots were fired at 7:15 P.M. He expected these witnesses to be called on his behalf.[11a] The trial record fully

[11a]Petitioner informs this Court in a footnote that the three witnesses *not* called at trial may very well have identified respondent then. (Pet.'s brief at page 11, footnote 10). Absolutely nothing supports this speculation, and every inference that can be drawn from the record refutes it. No prior statements or physical descriptions of any of the three witnesses were introduced at the state post conviction hearing, no mention was made of any of their testimony at the other trials and no recollection was offered by any prosecutor. The plain fact is that the sufficiency of the evidence question in this case haunted the Pennsylvania Supreme Court which affirmed by a 3-3 vote the 2-1 decision of the state trial court *en banc* on sufficiency of the evidence. Had any of these three witnesses had anything helpful to the prosecution it would have been proffered at the 1967 trial.

supports his expectation in that both of his lawyers repeatedly stated that these witnesses were available to discredit McGrath. Their testimony was characterized as vital. (R., Trial 1085).

One of the lawyers testifying at post-conviction proceedings has supplied the answer to the question why they were not called.

> "I ... recall that I felt it might be dangerous because one of the other two defendants leaving in a hurry might have been seen by those three witnesses and it might have damaged that defendant and it might have come out on the cross examination of those witnesses in Sullivan's case." (A. 63a).

Both attorneys were in actual conflict as between the representation of Sullivan whose case they were then trying and their ongoing representation of Carchidi and DePasquale, which in fact later resulted in acquittal for both. The attorneys' responsibilities to Sullivan were shackled by responsibilities owed their other two clients.

In *Holloway v. Arkansas*, 435 U.S. 371, 98 S.Ct. 1173 (1978), this Court gave recognition to the grave difficulty an appellate reviewing court may encounter in seeking to identify from a cold dispassionate transcript consequences of a lawyer's failure to perform certain trial tasks. The Chief Justice said:

> "... [I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice

resulting from an attorney's failure to undertake certain tasks, but even with the record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error would require here unlike most cases, unguided speculation." *Holloway v. Arkansas, supra* at 1182, emphasis in original.

In this capital case where the evidence supporting the convictions was scant, failure to call witnesses to rebut the Commonwealth's contention that respondent was present when the crimes were committed is a roll of loaded dice. That the windfall beneficiary of this conflict was the Commonwealth of Pennsylvania cannot be disputed. The clear fact is that respondent's lawyers found themselves refraining from calling witnesses, including the defendant, due to an actual conflict.[12]

[12]Such a conflict of loyalties would be given short shrift by a civil court. Judge, later Justice Cardozo's classic statement for the New York Court of Appeals in *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928) is still regarded as its benchmark:

"Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular

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The Third Circuit held that it could find no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship. (*United States ex rel. Sullivan v. Cuyler*, 593 F.2d 512, 522 (1979). The Court wrote:

"We believe this analysis is seriously flawed. It is undisputed that Peruto participated in the decision not to present a defense. He advised petitioner not to testify and suggest to co-counsel that witnesses not be called. No reason or evidence is offered to explain why an attorney would make the damaging admission of professional impropriety we have

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exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd: It will not consciously be lowered by any judgment of this court."

Again, speaking for the New York Court of Appeals, Judge Cardozo stressed the trustee's duties which respondent herein asserts should equally apply to counsel in a capital case:

"But 'the great rule law' which holds a trustee to the duty of constant and unqualified fidelity, is not a thing of form and phrases. A dominating influence may be exerted in other ways than by a vote . . . A beneficiary about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word. The trustee is free to stand aloof, while others act if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practiced eye. . . ."

There was an influence here, dominating perhaps, and surely potent and persuasive, which was exerted by Mr. Maynard from the beginning to the end . . ."

"There was, then, a relation of trust reposed, of influence exerted, of superior knowledge on the one side and legitimate dependence on the other. . . ." [Cite to Globe Woolen Co. v. Utica Gas Electric Co., 224 N.Y. 483, 121 N.E. 378 (1918)]

quoted were it not true. And Sullivan (albeit not a disinterested witness), corroborates his testimony. We have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney client relationship."

This Court posits testimony or information received from an attorney concerning conflicting interests in the following light:

"When a considered representation regarding a conflict in clients' interests come from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation." *Holloway v Arkansas, supra*, at 1180.

The testimony of another witness was anticipated by the defense. Michael Hession, a business agent, as was John Sullivan, had hired McGrath, and apparently had been McGrath's confidant on the evening of June 17 when McGrath went to him. Hession testified at the coronor's inquest on November 3, 1966 that McGrath told him on two different occasions his versions of what had happened on June 17.

Each of these two accounts differed materially from the one he gave at Sullivan's trial. In particular, in one of the accounts he said that he wasn't in the union hall when the "firecrackers" exploded.

Hession was under subpoena to the Commonwealth during the course of respondent's trial, a fact well known to both DiBona and Peruto. Counsel's failure to call Hession to contradict McGrath's evidence at trial is inexplicable. He was deceased at the time of the post-conviction proceedings, and the record reflects the fact that Hession testified at both the coronor's inquest and at co-defendant Carchidi's trial, but was not called

for respondent's trial. Carchidi's trial followed that of respondent by six months.

Hession's testimony was important for an additional reason. Hession knew respondent's hours of employment at the Union, and was required to be present in the union hall on numerous occasions during the evening hours with respondent. This evidence would have negated the Commonwealth's contention that there was something unusual in respondent's presence in the union hall on the evening in question at his trial. (R., Trial 90-92).

Of considerable significance to the outcome of respondent's trial was the fact that the attorney's who represented him owed a duty to Carchidi and the third co-defendant, DePasquale to advise them of their rights against self-incrimination. These obligations to the two co-defendants were ongoing while respondent's case was being prepared and tried. Even before the Commonwealth had completed its case, the trial record reflects the fact that Peruto advised the court that he would not call Carchidi because of his right to remain silent.

"Your Honor, as to working hours, the exact working hours of McGrath, were the same working hours of Carchidi, since they both had the same job.

"THE COURT: There is no evidence as to what Carchidi does.

MR. PERUTO: He is a janitor.

THE COURT: There is no proof.

MR. PERUTO: Your Honor, the fact that he was there after working hours, there is no evidence to support that statement.

THE COURT: Why are two janitors in one room?

MR. PERUTO: Perhaps that's where they were working.

THE COURT: Is that an explanation?

MR. PERUTO: You put me in this position; a statement by Carchidi offered into evidence and can only be refuted by Carchidi.

THE COURT: That is the law because a defendant refuses to testify he can't offer something."

MR. PERUTO: *The defendant can testify, but how can he testify to what Carchidi said, and you can't put Carchidi on the record.*" (R., Trial 670-671), (emphasis supplied.)

Petitioner's argument that the likelihood is great that Carchidi would have declined to testify at trial as an outgrowth of his earlier exercise of his right to remain silent at the coronor's inquest is misplaced. The issue is not whether Carchidi would testify. The issue is what advice did he receive from the same attorney or attorneys who represented respondent Sullivan which informed his judgment and decision. *United States v. Dolan*, 570 F.2d 1177 (3rd Cir. 1978); *United States v. Garafola*, 428 F. Supp. 620, (JD. N.J. 1977).

It is counsel's conflict, not Carchidi's, which requires examination. Since it is beyond question that the attorneys owed Carchidi undivided loyalty and unqualified fidelity, the possibility that his testimony in Sullivan's trial might have been detrimental to him posits nothing less than an actual conflict of interest. Similarly, the possibility that withholding Carchidi's testimony from Sullivan's trial would have been detrimental to Sullivan posits an actual conflict. In this sense the possibilities of conflict *are* conflicts.

If Carchidi could have been prejudiced if he were to

testify in Sullivan's trial, independent counsel should have made that judgment.[13] Speculation that he would or would not have waived his rights plays games with the degree of prejudice Sullivan suffered. Such fine lines have no application to the basic and fundamental rights to fair trial and due process which counsel undermined here. *Glasser v. United States, supra; Holloway v. Arkansas, supra; Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974).

That independent counsel may have been able to obtain the testimony of Carchidi and/or DePasquale is undisputed. Such a decision of necessity had to be made before trial. The testimony of Carchidi at post-conviction proceedings that he would in fact have testified for Sullivan is of some importance not because under any standard a finding of actual prejudice is required, but because his attorneys—the same attorneys who represented Sullivan—had already made the decision to protect him from testifying. Counsel's decision was a *fait accompli* before the Commonwealth had rested and is undisputed proof of actual conflict and prejudice in the representation of these three defendants. Once again the beneficiary of such conflict was the prosecution.

In this trial in which the Commonwealth proceeded upon the murder bills of indictment, the district attorney sought and obtained instructions to the jury on conspiracy to commit the murders, and in the

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[13]See *Commonwealth v. Pass*, referred to in *Armbrister: Act of Vengeance*, 303, where the same prosecutor involved in this case faced co-defendant Tony Boyle as a defense witness prior to Boyle's trial. 468 Pa. 36, 306 A.2d 167 (1976).

course of the trial almost anything which could prove even the slightest concert of action was worked over carefully to encompass respondent.[14] The decisions whether to present a unified defense, thereby stonewalling the conspiracy elements of these crimes, were made by the attorneys who represented all three of the defendants. Conflicts again overlie independent judgment. *Glasser v. United States, supra.*

The issue of whether to put on a defense and/or call the respondent to testify at trial was discussed. As stated by the Third Circuit in this case, *United States ex rel. Sullivan v. Cuyler, supra* at 519:

> "After the Commonwealth had completed its proofs, petitioner and counsel had a lengthy private conference on defense strategy, at which Peruto advised petitioner not to testify and not to present witnesses in his defense; this course was eventually chosen."

Later, the Third Circuit at page 523 was to hold that the fact that Sullivan followed "the course suggested by counsel" [in not taking stand] "... creates the possibility of prejudice."

It is not hard to find the evidence of record that led the Third Circuit to that inescapable conclusion, for Peruto testified:

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[14]See for example the testimony of McGrath that Sullivan suggested he defer his cleaning until after the union meeting, which was later suggested by Carchidi as well. The Commonwealth argued heatedly for proof of conspiracy between Sullivan and Carchidi, completely overlooking the record evidence that the victim Gorey himself had had a similar conversation with McGrath, when in fact McGrath had been derelict in his janitorial responsibilities. (R. Trial, 831-832).

"Q. Well, at any rate you had made a decision not at present any testimony anyway, hadn't you?

"A. In the Sullivan trial?

Q. The Sullivan case, yes.

A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that—and we communicated this to Sullivan—

THE COURT:

"When you say great discussion you mean lengthy discussion?"

THE WITNESS:

A. Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try.

Q. Wait—

A. And I'm afraid Sullivan suffered by that fact.

Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?"

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided

between themselves which of us they wanted to be chief counsel. John Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried." (A. 56a-58a).

Sullivan testified at post-conviction proceedings that he intended to testify on his own behalf,[15] that he repeatedly communicated this wish to his two attorneys, that his attorneys' advice was one attorney advocating taking the stand, and the other advocating silence. Peruto advocated silence.

Carchidi testified at post-conviction proceedings that he was present during a joint conference between and among the attorneys and the defendants when Sullivan "fought like hell to testify." (A. 198a).

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[15]"Q. Now you indicate that you wanted to testify.
"A. Yes, sir.
Q. Did Mr. Peruto want you to testify?
A. No, sir.
Q. And did Mr. DiBona want you to testify?
A. In the beginning he did, yes, sir.
Q. And who made the final decision? Which of the three of you?
A. I had nothing to do with the decision. It was given to me point blank. And Mr. Peruto, after like I say hours of discussion, Mr. Peruto said something to the effect of, 'Look, we're the attorneys. You don't know anything about law.'–I'm not quoting him verbatim, I'm using my own language–and 'your life is in my hands and we're out to protect you, and you're not to worry, that you'll be acquitted and we're assured that you'll be acquitted.' And I said 'Look, you got the ball, carry it.'" (A. 138a).

Mr. Peruto's recollection of how the decision was made was explicated at post-conviction proceedings as well. He said that he felt Sullivan should testify simply because in his opinion it was difficult to get a man acquitted where the jury does not hear from him. (A. 58a). He further said:

BY MR. LUNKENHEIMER (assistant district attorney):

"Do you recall whether John Sullivan said he did not want to take the stand?

"A. It seems to me–

Q. Do you recall one way or the other?

THE COURT:

"Let him answer it."

THE WITNESS:

A. The way I recall it my recollection seems to be that John Sullivan did want to testify because he kept saying over and over 'I didn't do nothing. I got nothing to hide.' Now whether he changed his mind or didn't testify because of what was said to him about the pitfalls of 'Look John'–words to the effect–'Look John, even though you have nothing to hide, Sprague, you're playing in his ballgame, in his yard, and he can make you look bad on these relationships with other women.', and things like that. And that may have been the deciding factor. I don't know. But my recollection seems to be that Sullivan did want to testify in the sense that he felt he had nothing to hide." (A. 70a-71a).

It thus appears that under any version of the facts Mr. Sullivan was given conflicting advice by his two attorneys even in the presence of a co-defendant to whom they owed an ongoing professional obligation.

The Third Circuit's order granting habeas corpus relief on grounds of conflicts of interest and prejudice in respondent's representation by two attorneys who also represented co-defendants finds abundant support in the record. The record in point of fact demonstrates unusually the objective repercussions which are grounded in the conflicts. Respondent's trial was simply a fact-finding process whose delicate balance was infected beginning to end by representation afforded by attorneys whose loyalties were divided. Guilt or innocence hung in the balance when critical decisions whether to call witnesses, including respondent, were filtered through the eye of the co-defendants' needle. It was a capital case.

This Court, it is respectfully suggested, improvidently granted certiorari in this case where the conflicts are abundantly clear and the Sixth and Fourteenth Amendment violations so flagrant. The judgment of the Third Circuit should be affirmed.

II.

THE THIRD CIRCUIT STANDARD THAT A POSSIBILITY OF PREJUDICE OR CONFLICT OF INTEREST, HOWEVER REMOTE, IN THE JOINT REPRESENTATION OF TWO OR MORE DEFENDANTS BY A SINGLE ATTORNEY COMPELS REVERSAL IS IN FUNDAMENTAL AGREEMENT WITH THAT OF SIX OTHER CIRCUITS, AND IN ANY EVENT CERTIORARI WAS IMPROVIDENTLY GRANTED IN THE INSTANT CASE IF THOUGHT TO BE EMBLEMATIC OF A DISAGREEMENT AMONG THE CIRCUITS.

The Third Circuit standard is not the equivalent of the conclusion that joint representation is presumptively violative of the Sixth Amendment as petitioner asserts. To the contrary, the standard requires a showing of "prejudice or conflict of interest, however remote." *Walker v. United States, supra.* This Court has no issue before it which compels it to consider whether joint representation is per se unconstitutional.

The extent of the record conflicts before the Third Circuit in the case *sub judice* resulted in its conclusion that reversal was compelled The specific recitation by the circuit court of the evidence underlying these conclusions is so ample that the Commonwealth of Pennsylvania's argument regarding *possible* conflict is inappropriate. The conflicts were not remote but actual. Upon a conclusion that there was in fact joint representation and conflict, no additional components of Sixth Amendment violation are required. Nevertheless respondent's position, which needs no buttressing, is nonetheless buttressed by the fact that he was not advised by the court or by counsel of the perils of joint representation.

In 1942 the *Glasser* Court articulated an obligation resting upon the trial judge to protect the fundamental rights of the accused including his right to effective counsel. Irrespective of a conflict of interest, the additional burden of representing another party may conceivably impair an attorney's effectiveness. It is for this reason that this Court in *Glasser* imposed a

Johnson v. Zerbst duty to determine on the record whether the accused understood his effective, conflict-free assistance of counsel rights, and whether he waived them.

The record of respondent's case is silent on this issue and no inquiry related to waiver was made by the trial judge. A judge even in 1967 should have made an effort to see to it that the basic and fundamental rights quaranteed by the Sixth and Fourteenth Amendments were not undermined or lost without respondent's knowledge or consent. An inquiry by the court may have disclosed to John Sullivan the perils of joint representation. If then he decided to give up his rights to be separately represented, the record would demonstrate an informed waiver. Contrary to its position here, it is the Commonwealth upon whom a heavy burden of proof should rest (where joint representation and a silent record for waiver purposes coincide) to establish that respondent was not prejudiced by the joint representation. *Kaplan v. Bombard,* 573 F.2d 708 (2nd Cir. 1978, Mansfield, J., concurring); *Colon v. Fogg,* 602 F.2d 403 (2nd Cir. 1978).

The trial judge should have known respondent's two attorneys were burdened by conflicting loyalties. They filed appearances for all three defendants, they appeared pretrial before the judge and filed motions on behalf of all three defendants, they informed the trial judge they could not call Carchidi to testify for Sullivan, and they asked the judge to tell the jury DePasquale was not even a co-defendant. (R., Trial, 1107-1108). The trial judge at one juncture told the attorneys he was tired of their trying to get discovery

for the other defendants. (R., Trial 1002). The judge knew or should have known Sullivan's attorneys were troubled by conflict, and his obligation to ascertain whether Sullivan was so informed is simply a corollary of Sixth Amendment effectiveness. *Colon v. Fogg, supra,* 407.

In examing the record for a Sixth Amendment violation, one of the most significant inquiries is the presence or absence of a waiver of separate representation. This is so in most circuits. In *United States ex rel. Hart v. Davenport, supra,* the Third Circuit expressed the admonition that the dangers inherent in joint representation are serious enough to warrant a warning to the accused at the earliest stage of the criminal justice process of the perils of joint representation. He may then make an informed choice whether to waive his right "to the unfettered representation made possible by separate counsel." See also *Government of the Virgin Islands v. Hernandez,* 476 F.2d 791 (3rd Cir. 1972).

The admonition in the *Hart-Davenport* case which has since been referred to as the *Davenport* inquiry in the Third Circuit, has not been considered a mandate in which reversal will automatically be ordered as in the District of Columbia Circuit, *Campbell v. United States,* 352 F.2d 359, (D.C. Cir. 1965). Nonetheless the *Davenport* inquiry is the equivalent of the requirement imposed in five other circuits excluding the District of Columbia Circuit. For example, the First Circuit in 1972 mandated an inquiry by the court of jointly represented defendants to determine a potential conflict. If such an inquiry is not conducted, the government has the burden of demonstrating the unlikelihood of prejudice by a

preponderance of the evidence.[16] *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). Nonetheless in *United States v. Donahue*, 560 F.2d 1039, 1045 (1st Cir. 1977) the court reversed because the government failed to establish "the improbability of prejudice" and made the further observation that alternative strategy required exploration for "potential for conflict of interest."

In the Second Circuit a waiver colloquy is mandated in joint representation cases. *United States v. DeBerry*, 487 F.2d 448 (2nd Cir. 1973). Even if the court finds an effective waiver of separate representation, however, a defense of Sixth Amendment violation can be shown if actual prejudice is demonstrated. *Kaplan v. Bombard, supra.* In *United States v. Carrigan*, 543 F.2d 1053 (2nd Cir. 1976), for example, the court found actual conflict of interest prejudiced a defendant who had executed a valid waiver, where the government had not established lack of prejudice.

In the Fourth Circuit also a waiver is suggested and if waiver is demonstrated a defendant must then show in order to prove a Sixth Amendment claim "some specific instance of prejudice, some real conflict of interest." *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir 1977, cert denied, 436 U.S. 944 (1978). In *Sawyer v. Brough*, 358 F.2d 70 (4th Cir. 1966) the court held the "possibility of harm" sufficient to render a

[16]The case *sub judice* is a silent record case concerning any waiver of conflicts. Because of this fact, the Third Circuit's opinion can be very simply explained on the clear basis that the Commonwealth failed to meet its burden of proof requiring it to establish the unlikelihood of prejudice with the Third Circuit ruling that respondent had established a very real possibility or potential of prejudice by having established actual conflicts.

conviction invalid, and in *United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974) the possibility of a conflict of interest or prejudice citing to *Walker v. United States, supra*, in the Third Circuit, was the rule of the court.

In the Seventh Circuit, however, the responsibility for avoiding conflicts situations rests with the bar rather than with the court, and a Sixth Amendment violation on conflicts grounds can be made out by demonstrating "with a reasonable degree of specificity that a conflict of interests actually existed at trial." *United States v. Mandell*, 525 F.2d 677 (7th Cir. 1975), cert. denied, 423 U.S. 1049, (1976).

In *Austin v. Erickson*, 477 F.2d 620 (8th Cir. 1973), the Eighth Circuit reversed and remanded on its finding of "an actual conflict of interest" or "a substantial possibility of a conflict" coupled with a silent record as to waiver. In so doing it cited to a Pennsylvania Supreme Court case which set the standard in Pennsylvania, *Commonwealth ex. rel. Whitling v. Russell*, 406 Pa. 45, 170 A.2d 641 (1962). The Eighth Circuit in *Beran v. United States*, 580 F.2d 324 (8th Cir. 1978, cert. denied, 99 S.Ct. 1422, 1979) held that the conflicts evidence need only be minimal.

To recapitulate, even in the cases where a valid waiver of the right to separate representation can be demonstrated of record a defendant nonetheless can successfully raise the claim of ineffective assistance by showing conflict and/or prejudice. It is in the standard for determining the allocation or responsibilities as between the trial judge and the attorney, and the effect of such a determination upon a subsequent claim of

conflict, that divides the circuits. The coincidence of joint representation, a silent record as to waiver, and conflicting interests as posited by this case, would require reversal on Sixth Amendment grounds in any circuit.

Petitioner's assertion that the record in the case *sub judice* does not support a finding of actual conflict is simply frivolous. The factual contents of the conflicts have been explicated in the Statement and in Argument I. The nature of the conflicts which the Third Circuit held required reversal when viewed from the standard point of the lawyer whose judgment is scrutinized is no less real than John Sullivan's sentences of consecutive life terms. The Commonwealth of Pennsylvania misreads both *Glasser* and *Holloway* in its argument that a defendant who has suffered convictions by reason of conflicts of counsel must bear a heavy burden before he can be successful in overturning the conviction.

Both *Glasser* and *Holloway* granted relief because the lawyers were aware of the inconsistent interests of their clients. This awareness is distinguished from an after the fact reconstruction of objective facts which leaves room for guess work and speculation. There is nothing speculative or unreal about counsels' exercise of judgment. Peruto said his advice to Sullivan was actually given because he perceived conflicting loyalties to all three defendants he represented. DiBona concedes only that decisions were made jointly between and among himself, his co-counsel, and his client, but he most assuredly represented the other two defendants, as the Third Circuit found, when the vital decisions were made for Sullivan. It is in this sense that the possibility of conflict which counsel perceived and acted upon be-

comes the real conflict. The Third Circuit demonstrated by its conclusions that it understood this distinction. Counsel considered Carchidi and DePasquale's interests in advising Sullivan to forebear a defense. *Commonwealth ex rel Sullivan v. Cuyler, supra,* 522. The lawyer actually understood his conflicting loyalties. That he understood his advice to Carchidi may harm Sullivan, or that giving Fifth Amendment advice to Carchidi may harm Carchidi, is an actual conflict. Similarly the withholding of evidence exculpatory of Sullivan because of the possibility of inculpating Carchidi or DePasquale is an actual conflict.

There is no way to arrive at an understanding of the meaning of conflict of interests standards absent an understanding of the attorney's role in joint representation. The judgmental factors which figure in the critical decisions whether to put on witnesses, whether to mount a defense at all, whether to stonewall a government attack, or on the other hand to meet it head on, are at the heart of our adversary system. An attorney who shackles himself in any way in making these judgments, playing off one interest against the other, is in actual conflict, and this is especially true here where those interests were those of his other clients.

It is difficult to imagine a stronger case of conflicting loyalties. The Sullivan trial can be viewed as a trial balloon for the two attorneys. At least one of these attorneys later acknowledged his improprieties in post-conviction proceedings,[17] as the Third Circuit noted.

[17]Joint representation of all three defendants was found as a matter of law by the Third Circuit. To believe that counsel DiBona had the ability to divorce himself completely from the interests of his other two clients requires believing that he did not recognize the conflicts or that he himself thought such troubled judgments were part of the "price" respondent had to pay for his representation. Neither position is defensible.

The plain facts are that John Sullivan was convicted of double murders on the thinnest of evidence, the issues surrounding which have mixed various courts.[18]

It is unusual to find a record plainly demonstrating that the guiding hand of counsel was in fact guiding the course of the co-defendants. Conflicts of this nature are rarely full-blown upon the record, and all the conflicts cases beginning with *Glasser* and concluding with *Holloway* recognize this fact. *Austin v. Erickson, supra; United States ex rel. Hart v. Davenport, supra.*

Even crediting DiBona's assertion that he perceived no conflict, an assertion which is contrary to that made by Peruto, does not dispose of the troublesome problem fairly encompassed by this record. The record may not reflect all of the temptations faced by counsel in this case. The record may not reflect the possibility that despite altruistic intentions, counsel may have in fact become less zealous. Respondent's right to conflict-free and effective counsel is an outgrowth of his fair trial rights and even possible violations of that right must be examined closely. *Zuck v. Alabama, supra,* 440. Clearly this Court's admonition in *Holloway* must include Sullivan's predicament. The mere presence of his attorneys at his trial does not fulfill the Sixth Amendment guarantee when it may be that his attorney's

[18]The trial court en banc split 2-1; the first Supreme Court of Pennsylvania decision split 3-3 on the sufficiency of the evidence; the post-conviction court authorized a second appeal because of ineffective assistance claims; the second Supreme Court of Pennsylvania decision split 5-2; the Federal magistrate recommended a writ issue; the District Court denied the writ; the three judge panel unanimously reversed; the petition for reargument was denied 6-3. Score: 17 for respondent; 15 opposed.

conflicting obligations effectively seal their lips on crucial matters. *Holloway v. Arkansas, supra,* 489.

Furthermore conflicts ineffectiveness is different in quality from competency effectiveness. As Judge Hill of the Fifth Circuit has noted:

> "Unlike *competency* of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself." *United States v. Alvarez,* 580 F.2d 1251, at 1256 (5th Cir. 1978).

Thus the result reached by the Third Circuit is predicated upon facts which would have led to relief in any circuit, and its standard which requires the mere possibility, however remote, of actual prejudice or conflict of interest is a correct standard where the record is silent and the state bears the burden of establishing the unlikelihood or the improbability of prejudice, and has failed to do so.

Once the conflict appears, as it did in the context of this case, the prisoner has met his initial burden, and it is the Commonwealth who must shoulder the appropriate burden, not the prisoner. Only by shifting the traditional allocation of the burden of proof can the Commonwealth prevail, and in an effort to do so it has torn the language of the Third Circuit, bleeding from its context, in a semantic attempt to convince this Court that this case posits issues which would be resolved differently in different circuits.

If the Court granted certiorari under such an impression, then it should find that certiorari was improvidently granted.

III.

BECAUSE STATE ACTION IS UNQUESTIONABLY PRESENT BY REASON OF JUDGMENTS OF THE STATE COURT IMPOSING CONSECUTIVE LIFE SENTENCES, AND BECAUSE RESPONDENT HAS ADDITIONALLY A SIXTH AMENDMENT RIGHT TO ENJOY THE ASSISTANCE OF COUNSEL, THE REQUIREMENTS OF THE SIXTH AND FOURTEENTH AMENDMENTS HAVE BEEN MET.

Respondent sought and was granted federal habeas corpus relief on the ground that he was held in custody by the Commonwealth of Pennsylvania in violation of the Constitution of the United States, 28 U.S.C. §2254(a). Specifically, his conviction was infected by dual representation which created a prejudicial conflict of interest in his attorneys' representation. As a result he did not "enjoy the right ... to have the Assistance of Counsel for his defense" as guaranteed by the Sixth Amendment.

Petitioner's "state action" argument (Point II of its brief), raised for the first time in this Court, fundamentally misconstrues this constitutional concept. Some provisions of the Constitution are protections of

the individual against the government and others are not. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The Fourteenth Amendment's due process clause clearly is of the former type, id., and state action as required by the Fourteenth Amendment is present in this case, as in every criminal case, by the State's imposition of judgment on the respondent, depriving him of liberty for the rest of his natural life (twice consecutively). Rather, the only question arguably presented here is whether the Sixth Amendment's guarantee of the effective assistance of counsel, see *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), means what the Sixth Amendment says ("the accused shall enjoy ... the Assistance of Counsel") or instead something quite different and much more limited (e.g., "the court shall not deny or deprive the accused of the assistance of counsel"). This Court has never held that only court or other official action can have the effect of denying an accused his Sixth Amendment right, but instead has rightly focused as the Amendment's language directs, on whether effective assistance was in fact enjoyed. See *Fitzgerald v. Estelle*, 505 F.2d 1334, 1344-46 & n.2 (5th Cir. 1975) (en banc) (Godbold, Brown, Rives, Wisdom & Goldberg, JJ., concurring in part); *United States ex rel. O'Brien v. Maroney*, 423 F.2d 865 (3rd Cir. 1970) (Seitz, J., concurring).

Just as there is no support in the Sixth Amendment's language or in this Court's opinions for reading an "official action" element into claims of denial of the right to the assistance of counsel, so there is no reason or logic behind such an innovation. A slight variation

on the facts of this case suggest the illogic of the proposition. Suppose that X and Y are charged with murder and X retains P to represent him. X then suggests to Y that P represent both at no cost to Y. The unscrupulous P then advises Y to plead guilty and testify on X's behalf, and X is acquitted. The judge and prosecutor know nothing of the scheme, nor could they, as P has done all the talking for both defendants. When Y files his habeas petition and proves these facts, can it reasonably be denied on the ground that the same vices that made the conflict intolerable also made it invisible to the trial court and therefore not subject to correction?

Respondent submits that the state's monopolistic control over the qualifications and discipline of the lawyers who are exclusively permitted to represent before its court persons charged with crime (*see Leis v. Flynt*, 429 U.S. 438, 442 (1979)) most certainly carries with it the obligation to avoid or correct this kind of miscarriage of justice.

That the Commonwealth of Pennsylvania herein asserts that great vitality exists in the retained-counsel/appointed counsel distinction is most troubling.

Initially, the trial court may or may not be on notice of any conflict despite the fact that counsel is appointed or retained Therefore the state's responsibility (as well as the harm to the defendant) is no different in either case.

Furthermore, the fact that counsel is court-appointed and compensated from the state is a meaningless fact in a practical constitutional context. Despite the fact that court appointed counsel are compensated by the state they are completely independent from the state, and in

no stretch of anyone's imagination could they ever be termed agents of the state. Our adversary system would be defeated if such were the case.

This fact is clearly recognized in the federal courts as well, this Court stating in *Ferri v Ackerman*, ____ U.S. ____, No. 78-5981 (decided December 4, 1979) in regard to a state case:

> "Indeed, Congress' attempt to minimize the differences between retained and appointed counsel is more consistent with the view that Congress intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls."

The issue the Commonwealth raises before this Court is simply whether or not the Sixth Amendment applies to protect respondent Sullivan at all, not whether or not state action is present.

Thus the Commonwealth confuses the concept of state action with the substantive question of whether or not the Sixth Amendment is violated by a conflict of interest on the part of defense counsel when the trial court allegedly is not put on notice of the conflict.

It is to be noted that the distinctions drawn by the Commonwealth herein have never been drawn by this Court, and this Court treated counsel in both *Glasser, supra* (retained counsel) and *Holloway, supra* (appointed counsel) in parallel fashion.

The Chief Justice made the observation ten years ago that "defense counsel who is appointed by the court ... has exactly the same duties and burdens and responsibilities as the highly paid, paid in advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense–Their Roles Under the Minimum Standards*, 8 Amer. Crim. Law Q. 1, 6 (1969).

At a time when the American public is fast losing confidence in its attorneys, and at a time when judicial criticism of the trial bar is almost raging, can the Commonwealth of Pennsylvania seriously argue that the Constitution of the United States does not cover those persons who are fortunate enough to have the funds to retain counsel, and any right to reversal due to ineffectiveness or conflicts of interest as to such a class of defendents is nonexistant?

The court appointed attorney is the fundamental right of the indigent. At no time has the source of the fee paid to such attorney been magnified so as to cause a constitutional difference in his accountability as opposed to the accountability of the private defense bar, and any attempt to do so would cause serious equal protection problems. Such attempts have been strenuously resisted on each and every occasion.

The adversary system is the jewel of the trial that comports with due process, and our system promises those accused of crime that a trial will be held. The state's promise of a trial and the awesome machinery of the criminal justice system therein employed at the very least implies that the state is under the obligation to protect such machinery at least to the extent that constitutionally effective representation is afforded to all those who are accused.[18a]

The court itself has the obligation imposed upon it to insure against unintelligent waivers of such fundamental rights as trial by jury as well as in the guilty plea colloquy. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

[18a] "In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." Lakeside v. Oregon, 435 U.S. 333, 341, 55 L.Ed.2d 319, 98 S.Ct. 1091 (1978).

The adversary system itself is a major element of due process of law. This Court so held in *Herring v. New York*, 422 U.S. 853, 857 (1975):

> "More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments."

The break down of the adversary system violates due process of law. Nothing will serve to defeat and debase the adversary system to a greater extent than defense counsel shackled by a secret and invisible conflict of interest.

As an officer of the court, a defense attorney owes a duty to the court not to defeat the adversary system by bringing such conflicts to its bar, especially in this case which was a capital one. The court, on the other hand, *must* bear the responsibility should such an invisible secret conflict later surface due to its responsibility for its officers.

A fundamentally unfair trial results when the defense is burdened by conflicts and the state is the illegitimate beneficiary of same. The promise of the adversary system is broken, and the pursuit of the truth and the proper determination of facts will be hindered significantly. See *Herring v. New York, supra.*

Says the Commonwealth of Pennsylvania, such is the price of retained counsel. Respondent, as earnestly and as strenuously as he can, asserts that that price is far too high, and need not be paid under our Constitution.

If a finding of state action is necessary in order to guarantee respondent his Sixth Amendment rights, then it is more than clear that the trial court in this case knew, or should have known that respondent's attorneys were laboring in a context that was rife with conflict or the possibility of same.

The mere fact that respondent's attorneys made known countless times the fact that they jointly represented all three defendants charged with this crime should have put the trial court on notice that conflicting interests were likely to arise, and a waiver colloquy should have been held with respondent. No such action was taken by the trial court in 1967, and that inaction, standing alone, should be sufficient for this Court to find the hand of the state at work.[19]

Coupled with the obvious joint representation of all three codefendants capitally charged and known to the trial court, is the fact that even prior to the Commonwealth's resting its case, Peruto made clear to the court that Carchidi (represented by both Peruto and DiBona) would not take the witness stand on behalf of respondent.[20]

This, standing alone should have alerted the trial judge and at the very least indicated to it that a

[19]It is a well known fact today, where multiple defendants are jointly represented by private counsel, that trial jurists are careful to obtain a waiver of any conflict which is existent or which may arise during trial. If petitioner is correct in its position that where the trial court is not on notice of any conflict no constitutional right is violated most of these colloquies are meaningless.

[20]It was this conflict that was described by the Third Circuit as requiring reversal "even under a rule requiring prejudice." *United States ex rel Sullivan v. Cuyler, supra.* at 522, 523.

waiver colloquy with the defendant was necessitated. Again, no such action was taken. It cannot be asserted that the very attorneys with the conflict should have taken the action since the conflict locks them in, and was buried deeper. It was, and indeed is, the trial judge upon whom the responsibility rested. His failure to act is again the hand of the state at work, and is state action for purposes of the Fourteenth Amendment since the trial jurist can be said to have participated in a fundamentally unfair trial Cf. *Shelley v. Kraemer,* 334 U.S. 1 (1948).

Again, state action can be found in the plain fact that the state was, and is, the beneficiary of the conflicting interests shared by respondent's attorneys.

As such, the state is the illegitimate beneficiary of same, and should not be allowed to maintain and enforce its judgment of life imprisonment under such circumstances.

This is exactly what the state has done in this case, trying respondent, convicting him, sentencing him, and denying relief throughout these proceedings, refusing to recognize the clear legal implications and vices of the conflicts delineated by the Third Circuit which honored its overriding duty to make its own independent examination of the record as to alleged violations of federal constitutional rights, a duty which rests "on [its] solemn responsibility for maintaining the Constitution inviolate." *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1958).

What is particularly egregious is that the record of conflicts and ineffective assistance in this case which began pre-trial and continued through the appellate process in the Supreme Court of Pennsylvania was

compounded by the state court's refusal to recognize and remedy the constitutional violations. The same attorneys represented the co-defendants who were acquitted prior to respondent's sentencing and the filing of his appeals to the Pennsylvania Supreme Court.

Numerous continuances of the appeals were requested by the attorneys. Although Judge DiBona was appointed to the bench of the Court of Common Pleas of Philadelphia in 1969 the docket in the Supreme Court of Pennsylvania does not reflect the filing of a motion to withdraw his appearance as counsel for respondent. In post-conviction proceedings in 1974, Judge DiBona said that prior to his appointment to the bench he did not file a brief on respondent's behalf in the state supreme court. (R., PCHA, 9). Unfortunately for respondent, no brief was filed by Mr. Peruto either. (A. 44a-46a).

The post conviction court entered an order finding ineffective assistance of counsel on these facts. The clients who actually engaged the services of the lawyers no longer needed them, since they were acquitted. Yet the dilemma of respondent's ineffective assistance claims as to which conflicts adhered continued.

The lawyers abandoned him after filing the appeals. These first degree murder cases went unbriefed and unargued. (R., PCHA, 9). To what extent continuances and failure to brief or argue his cases contributed to the three and a half year delay before the Pennsylvania Supreme Court decided the appeals is not of record. However John Sullivan was in prison throughout this time, and the conflicts issues he later raised on post-conviction proceedings were not cognizable by any court until the decision of the Pennsylvania Supreme

Court on December 29, 1971. There is therefore actual prejudice to respondent resulting from the ineffective assistance claims he was forestalled from raising for so many years.

As if these deprivations were not sufficiently egregious, the post-conviction court granted only partial relief (a new appeal), thus impressing a state action imprimatur on a case which already was overburdened with fundamental unfairness. The second appeal prosecuted to the Pennsylvania Supreme Court also resulted in a decision which failed to grant relief. The same perils in conflictive representation which respondent asserted in post-conviction proceedings were invisible in the Supreme Court of Pennsylvania as well.

The Commonwealth of Pennsylvania had numerous opportunities to provide respondent with a fair trial, and to correct what was already a fundamentally unfair trial because of conflicts. Its failure to do so was state action monolithically impressed upon an accused who remained throughout imprisoned as a result of Sixth Amendment ineffectiveness, and no other state action need be shown.[21] *United States ex rel. Hart v. Davenport, supra; Zuck v. Alabama supra* at 439; *United States v. Alvarez, supra*, 256; *Fitzgerald v. Estelle, supra; Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979); *Porter v. United States*, 298 F.2d 461 (5th Cir. 1962).

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[21]Petitioner's assertion that the Third Circuit erred in even considering respondent's claims, where he was represented by private counsel, is particularly ill conceived. Petitioner herein never raised a state action argument in the District Court or in the Third Circuit, as respondent herein argued in his answer to the petition for certiorari. For the Commonwealth of Pennsylvania to suggest to this Court that once certiorari was granted, respondent should now be foreclosed from replying to the state action argument is too frivolous to require further observation.

IV.

THE THIRD CIRCUIT DID NOT VIOLATE APPROPRIATE LIMITS OF APPELLATE REVIEW, NOR DID IT ENGAGE IN DE NOVO FACT FINDING.

Petitioner attacks the right and the power of the Third Circuit to draw legal conclusions from the record facts developed in the state court hearings. These legal conclusions apply to (1) the question of whether dual representation existed as a matter of law, and if so (2) whether respondent's counsel was burdened with several conflicting interests.

Initially it is important to note that the Commonwealth herein again adopts an inconsistent position in that it vigorously argues to this Court that Peruto's testimony is not worthy of belief, an qrgument abandoned in the Third Circuit. As the Third Circuit stated in *Sullivan, supra* at 522:

> "Respondents do not argue here, as they did in the court below, that Peruto's testimony is unworthy of belief, perhaps because they rely upon it so heavily in support of their contention that there was no dual representation."

Thus, in large part, the Commonwealth has waived this argument.

As to the propriety of drawing legal conclusions from the historical facts of record the Commonwealth asks this Court to give much credit the Pennsylvania Supreme Court's ruling that no dual representation was present in this case.

The record facts found in the state post-conviction hearing by Judge Doty were simply that Peruto and

DiBona were "co-counsel." (Opinion, November 6, 1974).

In ruling that the legal conclusion drawn from the record by the Pennslyvania Supreme Court was both erroneous and not supported by the record, as well as being contrary to the finding of the lower state court, the Third Circuit ruled:

> "The state court [Supreme Court] based its finding that there was no dual representation on its assessment of Peruto's role in petitioner's defense. It concluded that his role was so minor that he was the sole responsibility of Judge DiBona. We believe that an attorney who enters an appearance on behalf of a criminal defendant, consults with him confidentially for the purpose of preparing a defense, investigates his case, aids in the pretrial preparation of his defense, appears at his trial, participates in the selection of the jury that is to decide his fate, argues motions and objections, confers with co-counsel on trial strategy, offers the defendant legal advice, including advice on whether he should testify or present evidence in his defense and argues the issue of penalty, a matter of life and death, to the jury on the defendant's behalf must be said to represent that defendant and owe to him all the duties an attorney ows to a client in a criminal case. We find that Peruto represented Sullivan as well as Carchidi and DePasquale." *United States ex rel. Sullivan v. Cuyler,* supra at 519.

The Commonwealth argues that the Pennsylvania Supreme Court found facts regarding Peruto's testimony that must be considered presumptively correct under 28 U.S.C. §2254(d), but is unable to cite any Pennsylvania case where the Supreme Court found facts in the first instance. To the contrary, Pennsylvania appellate

practice cautions strongly against such a practice by any of its appellate courts, and did so explicitly in this very case. See *Commonwealth v. Sullivan*, 372 Pa. 129, 371 A.2d 468, (1977).

> "... The structure and function of an appellate court precludes it from being an initial factfinder." Cites omitted. *Commonwealth v. Sullivan*, supra, at 475.

The gratuitous conclusion of the Pennsylvania Supreme Court that "absolutely no conflict" existed is just that. By ruling that Peruto's "minor" role was insufficient to sustain a finding of dual representation, the Pennsylvania Supreme Court, focusing solely on DiBona totally eliminated any review of the conflict of interest question posited by this dual representation.

Finding dual representation the Third Circuit then had the power, and indeed the duty, to determine the existence or nonexistence of a conflict under federal standards of right to counsel, a pure question of federal law, which it did so, contrary to the hopes of the Commonwealth.

Federal Courts on habeas petitions have the singular duty to make an independent study of the record before them to determine whether or not the state court conclusions are supported therein. See *Neil v. Biggers*, 409 U.S. 188 (1972); *Dodge v. Johnson*, 471 F.2d 1249 (6th Cir. 1973); and are "in no way foreclosed ... by the fact that the state trial judge or the jury may have reached a different result on this issue." *Haynes v. Washington*, 373 U.S. 503, 515 (1963).

It is painfully obvious here that the Third Circuit considered the record, rejected the legal conclusion of the state appellate court that no dual representation was presented, found itself obliged to determine Peruto's legal status vis a vis respondent, found that the Commonwealth, before them, did not argue that Peruto was unworthy of belief and indeed relied heavily upon his testimony itself, and further did not dispute his of record advice to respondent.[22] Having the right, the power, and the duty to review the record independently for errors of federal law applied to the factual context of this case, it can be said without cavil that the conclusions of the Third Circuit were "justified." See *Neil v. Biggers*, 409 U.S. 188 at 193, n.3, (1972) citing *Boulden v. Holman*, 394 U.S. 478 (1969).

The alleged dispute herein is, as it was in *Neil v. Biggers*, supra. "... not so much over the elemental facts as over the constitutional significance to be attached to them."

Measured by the of record trial activity Peruto engaged in during Sullivan's trial the Third Circuit's application of federal law compels the conclusion that dual representation was present, and significantly even the dissenters from the petition to reargue this case also so found, making this decision unanimous. ("Hence, I agree with the panel that Sullivan presents a case of dual representation." *Sullivan, supra* at 525.)

The trial record alone reveals that Peruto, qua

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[22]This flowed inexorably from the Commonwealth's argument that regardless of what affected the judgment of respondent's attorneys, they were retained by him and that there was no conflict at all—a position the Commonwealth maintains to this day.

Sullivan's attorney, investigated the case, entered his appearance, helped voir dire and select the jury, presented innumerable arguments to the trial court,[23] informed both court and jury that the defense had been entrusted to him resting without presenting any evidence, and finally, made respondent's speech in opposition to the death penalty.

Moreover, to Sullivan, Peruto was one of his attorneys. Indeed, if the quesiton arose in the different context of whether or not an attorney client privilege existed between Sullivan and Peruto no court would, or could, rule that DiBona was Sullivan's sole attorney or that dual representation was not present here.

Federal Courts have long had the power, and indeed the duty, to correctly apply legal standards to erroneous state court conclusions of federal law. See *Fay v. Noia*, 372 U.S. 391 (1963), and 28 U.S.C. §2254.

It is crucial to note herein that once the Pennsylvania Supreme Court ruled that no dual representation existed it then ruled that DiBona's testimony that he "was in no way affected by the considereation of the co-defendant's cases ..." was dispositive. *Commonwealth v. Sullivan*, 472 Pa. 129 371 A.2d 468 at 483 (1977).

In holding that "... there is absolutely no evidence that a conflict existed" *Commonwealth v. Sullivan*, supra at 483, the Supreme Court of Pennsylvania so

[23]These can be found in the trial records at: May 17, 1967, 48-57; June 7, 1967, 7-53; 74-76, 121-125, 149-157; June 8, 1967, 170, 173-175; June 13, 1967, 666-672, 658; June 14, 1967, 720-729, 808-809; June 15, 1967, 934-947, 1000-1010, 1064-1066, 1072-1081; June 16, 1967, 1094-1131; June 18, 1967, 1139-1140, 1228-1230, 1247-1267, 1278-1280.

found *only* because it had eliminated Peruto from any consideration of any conflict.

Thus, the Third Circuit did not act inconsistently with the rationale of the Pennsylvania Supreme Court or find *de novo* facts herein, but did correctly apply a federal legal standard to the undisputed and unchallenged facts of record which had been erroneously construed by the state's highest court.

The Commonwealth next launches an argument to this Court asserting that the Third Circuit transgressed appropriate appellate review in crediting Peruto's testimony concerning the conflicts.

The Commonwealth's brief laments:

> "... the Third Circuit *sua sponte* credited Peruto's assertions regarding his tactical suggestions and his motivation, and indeed accorded them dispositive weight, simply because '[n]o reason or evidence is offered to explain why an attorney would make [this] damaging admission of professional impropriety ... were it not true.' " (Petitioner's brief, at page 43).

The Commonwealth does not quote that portion of the opinion which points out who strategically offered "no reason or evidence" to dispute Peruto's testimony:

> "Respondents do not argue here, as they did below, that Peruto's testimony is unworthy of belief ..." U.S. ex rel. Sullivan v. Cuyler, at 522.

As such, it ill becomes the Commonwealth to juggle its position when it requested no hearing on this habeas petition, was content to rely on the record, and invited the Third Circuit to credit Peruto's testimony concerning the dual representation issues.

The Commonwealth next argues to this Court that

the appellate vice it discerns must result in a remand solely because questions of elemental fact concerning whether counsel Peruto "ever in fact advised against presenting a defense, and if so whether that advice was in fact motivated by a concern for the other two co-defendants, were just that–questions of basic and elemental fact, properly answereable only by a hearing court afforded the opportunity to observe the witnesses and to evaluate his ability to remember and his credibility." (Petitioner's brief, page 43).

Upon this slim reed rests the Commonwealth's entire argument that the Third Circuit "transgressed appropriate limits of appellate review by making *de novo* findings of fact . . .".

The record is more than clear that Peruto did in fact advise against any defense and that such advice was motivated by his concern for the conflicting interests of his other two clients.

[By Peruto:]

"A. Yes. I can recall the great discussions that we had with Sullivan where we were so convinced that–and we communicated this to Sullivan–

[The Court:]

"When you say great discussion you mean lengthy discussions?"

[The Witness:]

Lengthy discussion, yes, sir. Where we felt that he couldn't possibly be convicted and, therefore, what's the sense in exposing the defense because we had two more defendants to try."

[By Defense Counsel at Post-Conviction Hearing Act Hearing:]

"Q. Wait–

"A. And I'm afraid Sullivan suffered by that fact.

"Q. Wait just a minute, sir. You were concerned with the other two defendants you represented; is that correct?

A. Yes. Why expose your defense if you've got two more people to come to trial and the Commonwealth has not presented a case?

Q. So that entered into your consideration as to whether or not you presented a defense in the Sullivan case?"

A. Sure, it did. When we're talking about back and forth. For example, I've heard Judge DiBona testify today, and, yes, we were sort of playing devil's advocate. I didn't want the defense to go on because I thought we would only be exposing the defendant [sic] witnesses for the other two trials that were coming up. Now on the other hand, you see, the three defendants had already decided between themselves which of us they wanted to be chief counsel. John Sullivan picked Fred DiBona, the other two defendants picked me. So certainly I had to be chief counsel and face the trial of the other two men. And as I look back on that, although it was not my thought that John Sullivan should be short-changed in any fashion, I'm afraid that it was my thought that I was over-solicitous for the other two defendants being ready to be tried." (A. 65a-58a).

Moreover, this too was not subject to dispute in the Third Circuit which ruled:

"It is undisputed that Peruto participated in the decision not to present a defense." *Sullivan*, supra, at 522.

The unique issue herein posited–the detrimental

effect of respondent's being represented by attorneys whose interests were divided, whose judgments were clouded in the context of this case with concerns for other defendants yet untried and the clearly erroneous state court ruling that dual representation did not exist left the record in such a state that no fact was in dispute as to the conflicts that burdened counsel. Peruto's testimony concerning the conflicts is uncontradicted, comes from an officer of the court, was not challenged as being unworthy of belief in the Third Circuit and his actions vis a vis Sullivan as to his advices not to take the stand or present a defense, and his posture qua co-defendant Carchidi, are not disputed.

In conformity with *Townsend v Sain*, 372 U.S. 293 (1963) and 28 U.S.C. §2254(D)(1) the Third Circuit corrected an erroneous state law ruling as to federal constitutional law, found no facts in dispute, and appropriately resolved conclusions of law which had not been resolved in the state courts after such remedies were exhausted. A remand would, in the context of this case, serve no purpose.

V.

THE LIKELIHOOD THAT CONFLICTS OF INTEREST WILL OCCUR WHENEVER AN ATTORNEY REPRESENTS MULTIPLE CLIENTS IS SO GREAT THAT A PROPHYLACTIC RULE PROHIBITING JOINT REPRESENTATION SHOULD BE ORDERED BY THIS COURT.

Arguments I and II demonstrate ineffective assistance of counsel and a fundamentally unfair trial grounded on

flagrant conflicts of interest, at least one instance of actual prejudice and a silent record as to any conflict or waiver of separate representation. There is therefore no issue before this Court which warrants reversal of the Third Circuit's grant of habeas corpus relief to John Sullivan.

Although petitioner argues that little more than joint representation supported the Third Circuit's order, petitioner misperceived the findings of the circuit court firmly secured upon substantial evidence of conflicts and prejudice. The record of respondent's case, however, is so unusual in its demonstration of the hazards of joint representation that it may be now appropriate to consider the benefit of a better-late-than-sorry prophylactic rule which does in fact prohibit joint representation *per se*.

A. The Courts are unable to fulfill the constitutional obligation to protect the rights of defendants who are jointly represented.

Glasser v. United States, supra 465, recognized the weighty obligation of trial judges to see to it that the essential rights of the accused in a criminal trial are protected. Among these rights, fundamental and essential to a fair trial, is the Sixth Amendment right to the effective assistance of counsel. *Gideon v. Wainwright*, supra, 342; United States Constitution, Amendments VI and XIV. The lower courts since the holding in *Glasser* have formulated and the appellate courts have reviewed, standards for assuring the fulfillment of the Constitutional obligation. Where the lower court requires the trial judge to inquire into a defendant's understanding of his right to be separately represented,

the court may request that the defendant waive objection to joint representation.

The appellate courts reviewing these inquiries and waivers examine the record also to determine whether despite these safeguards a conflict of interest adhered unconstitutionally to representation.

Where inquiry is not mandated but merely suggested, or where no inquiry component is formulated, the focus of appellate review is also upon the conflict or prejudice which the record demonstrates. The difficulty in articulating standards for evaluating when a conflict of interest arises has occupied trial and appellate courts and has spawned a substantial body of opinions which admit of little consistency. (See Argument II).

As a general proposition the mere fact that two or more defendants are represented by the same attorney should alert the trial judge to the possibility that their interests are conflicting and should prompt an inquiry of some sort. *United States v. Truglio*, 493 F.2d 574, 579 (4th Cir. 1974). Whatever is the nature of the inquiry, it should come at the earliest stage of the criminal justice process. *United States ex rel. Hart v. Davenport*, supra, 210; *United States v. Lawriw*, 568 F.2d 98, 103, (8th Cir. 1978), *cert. denied*, 435 U.S. 969 (1978).

The issue however is not only whether the judge has, or perceives that he has, a duty to inquire into joint representation, but also what function that inquiry serves and can be expected to serve. If the function of the inquiry is to protect a defendant's right to effective counsel by assuring conflict-free counsel, the trial judge would be required to ask the defendant what his defenses are, what advice he has received from his

attorney as regards proof, whether his co-defendant intends to assert the same defenses, whether inculpatory statements were given by his co-defendant which implicates him, whether the backgrounds of the jointly represented defendants are similar or dissimilar. There are few "facts" in the abstract which can inform an intelligent inquiry. The court cannot, and should not attempt to, conduct a searching colloquy which remains consistent with a defendant's Fifth Amendment privilege against self-incrimination, the attorney-client privilege, and the potentiality that a perjury charge may be brought if the defendant's testimony differs from trial testimony.

Furthermore the realities of criminal trials are such that superficial statements or questions by the trial judge, and monosyllabic answers by the defendants, do not safeguard constitutional rights. The right sought to be protected by inquiry is the right to have the undivided loyalty of an attorney who is in a position to give it. A warning by the court that a defendant has the right to separate counsel is a recognition that separate counsel is a predicate to Sixth Amendment effectiveness.

If on the other hand the function of the inquiry is to obtain a waiver of a defendant's right to separate counsel, the defendant must first know and understand the right he is being asked to surrender. The fact that he needs a lawyer may not be difficult to understand. It may also appear economically reasonable to be represented by the same lawyer who represents a co-defendant similarly charged The ability to predict problems involving trial preparation and trial advocacy where he shares the same attorney is not always

possible, even for the attorney. Infinitely more difficult would such a decision be for the average defendant standing before the trial judge.[24] The guiding hand of the attorney *whose conflict is being scrutinized* is essential to the defendant's decision to waive joint representation. Under the circumstances the attorney is in a different kind of conflict if he should offer his advice, and his advice is vital at this juncture. The *Johnson v. Zerbst*, 304 U.S. 458 464 (1938) waiver of the essential right to counsel cannot be made where, as here, a defendant does not truly comprehend the right he is waiving, is advised to waive it by one who at that juncture operates in a new conflict-laden area, and where he contemplates giving up something which may not yet have occurred. He may do so without ever knowing what trial strategy was lost or plea bargain shelved. *United States v. Garafola*, supra, 623; *United States v. Dolan*, supra, 1182 Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939, 971 (1978); Geer, *Conflicts of Interests and Multiple Defendants in a Criminal Case: Professional Responsibilities of the Defense Attorney*, 62

[24]"It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a co-defendant the course of events in the prosecution of the case, the taking of a guilty plea, or the conduct of the trial may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively. Even defense counsel, who all too frequently are not adequately informed regarding the evidence available against their clients, may not be in a position to judge whether a conflict of interest between their clients may develop." *United States v. Carrigan*, 543 F.2d 1053 (2nd Cir. 1976) at 1058.

Minn. L. Rev. 119, 141 42 (1977).

Under such circumstances, asking a defendant to give up a valued right fundamental to fair trial is in itself fundamentally unfair. The likelihood is great that such a waiver may be obtained from an accused in order to support a standard requiring a heavy burden of demonstrating prejudice on appeal. Judge Lacey's assessment of the function of an inquiry into joint representation is stated as follows:

> "The trial judge is placed in a difficult position when, at arraignment, he is confronted with joint representation by defendants' counsel. The *Davenport* inquiry, by and large is an ineffective charade. The judge and counsel know the purpose of the inquiry: to forestall a convicted defendant from later successfully urging on appeal that he did not at trial have effective assistance of counsel. Put in other words, it is done to construct a predicate for claiming later that there has been a waiver of a constitutional right. For reasons I shall explicate, it fails utterly as a means of assuring an informed consent from jointly represented–and unsophisticated–defendants. *United States v. Garafola*, supra at 623.

While inquiry into possible conflicts of interest, however inappropriate or ineffective, appear on the record for the benefit of the reviewing court, an underlying conflict of interest in joint representation is unlikely to surface on review. The selection of defenses and mapping of strategy which occurs before a case comes to trial, never appear upon the record. Counsel for a single defendant may have the opportunity to exercise free choice in charting the defense; joint representation usually labors under the demands of

multiple defenses, connected by the "united we stand, divided we fall" stratagem. Conflict of interest (unreported for appellate review) arises in the lawyer's office, or the jailhouse in the court of selecting strategy, rather than in the courtroom recorded by the stenographer. *Stephens v. United States*, 595 F.2d 1066, 1068 (5th Cir. 1979); *Austin v. Erickson*, supra, 625-26, citing to *Commonwealth ex rel. Whitling v Russell*, 406 Pa. 45, 176 A.2d 641 (1962); *United States v. Lawriw*, supra, 105.

The likelihood that the courts in fact safeguard the right of a defendant to enjoy the assistance of counsel is marginal where counsel also represents a co-defendant.

B. Where the courts have looked to members of the bar to bear the responsibility of insuring that the Sixth Amendment is not violated, that expectation is unfulfilled.

Can the lawyer wear two hats at one and the same time? It is hardly frivolity to suggest that an attorney who faces the reality of offering undivided loyalty to a client cannot give 100 per cent of his loyalty to *two* clients. There appears always to be the possibility that the interests of defendants jointly represented may become "conflicting, inconsistent diverse or otherwise discordant."[25]

[25]"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. ABA, Code of Professional Responsibility, EC 5-14.

The ethical obligation specifically demanded of all attorneys is to refrain from representing multiple clients with differing interests because there are few situations where he would be justified in risking conflict.[26] One Circuit has codified the ethical obligation of attorneys as respects conflicts of interest by requiring adherence to "ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar." *United States ex rel. Hart v Davenport, supra*, 210.

The experience of public defenders has prompted a recent report that 70 per cent of those attorneys who responded to a survey had strong preferences for separate rather than multiple representation. Lowenthal, *supra*, 950. The reason assigned most frequently for the opposition to joint representation in this group of attorneys is the widespread belief among them that the interests of co-defendants conflict in virtually every case.

It is more than obvious that attorneys representing multiple clients cannot foresee conflicts which may arise. Neither defenses nor strategy remains static. That which pretrial may appear certain may dissolve when the jury is sworn. A defendant may withhold information or be misinformed, a missing witness may be located, or the government may offer a plea bargain.

[26]"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests. . . ." ABA, Code of Professional Responsibility, EC 5-15.

An alibi requires investigation or evidence develops tending to prove the crime was committed by someone else. The range of possible conflicts which may arise if the attorney also represents a co-defendant whose alibi conflicts with that of the other client, or whose background is different, or whose actual complicity may be greater or lesser is infinite. A defendant is entitled to "... a vigorous advocate having the single aim of acquittal by all means fair and honorable ... [not] hobbled or fettered or restrained by commitments to others." *Porter v United States*, 298 F.2d 461, 463 (5th Cir. 1962).

The plain meaning of the ethical obligation is to refrain from multiple representation because of the great likelihood that joint representation in and of itself will create a conflict of interest. Judge Lacey in *United States v. Garafola*, supra, 628 annexed to his opinion a form which he suggested should be filed by counsel in every case of multiple representation. The promise exacted of an attorney under such circumstances is to fulfill his ethical obligation by giving the court assurances that there is no conflict of interest. Recognition must be given to the probability that even if these assurances can be given counsel may be unwilling or unable to foresee developments which require changes in strategy. *United States v. Mari*, 526 F.2d 117, 119-121 (2nd Cir. 1975) (Oakes, C. J., concurring.)

The possibility that an attorney representing more than one client similarly charged may be called upon to make choices between the interests of his clients looms at every stage of the criminal proceeding from the moment he is retained to the end of the trial. Simply

to define the nature of the relationship of counsel with his client raises grave questions about the dangers inherent in multiple representation. What is the hazard in joint representation that prompts trial judges to inquire of a defendant whether he waives his right to separate counsel? To put the question is to suggest the answer. It is that some strategem of the attorney will adversely affect the interest of one defendant while advancing the interest of the other.

Rule 44(c) of the Federal Rules of Criminal Procedure provides:

> "Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

While one aspect of the Rule is clear, i.e., that the requirement of an inquiry by the trial court will now be uniform in the federal courts, other aspects are murky. The Rule by definition is implicated only after the cases are joined for trial, and consequently no inquiry need be made during the critical pretrial stage when conflicts of interest are likely to flourish. This includes by definition confidences of multiple defendants, investigations and interviews of witnesses

consciously or subconsciously geared to accommodate the exchanged confidences, and fee arrangements.

Moreover, the Rule does not define conflict of interest nor offer suggestions as to how to analyze the role of counsel who provides joint representation. In perpetuating the requirement of inquiry by the trial judge, it is regrettable that no standards as to conflicts are set. As has been noted in Subsection A of this Argument, the judge simply cannot, consistent with his judicial role, and with the Constitutional rights of the defendants, inquire sufficiently to obtain the information he seeks–if indeed it is obtainable. The exacting requirements of the inquiry and the locating and defining of conflicts are the principal sources of asserted error assigned on appeal, and Rule 44c is not likely to correct this problem. This conclusion is buttressed by the fact that the inquiry is not mandated, and may be subject to review on appeal.

In *Holloway v. Arkansas*, supra, this Court gave expression to the aspirational tradition that a lawyer, who perceived the contraints of joint representation, would advise the court of these constraints. It was Holloway's lawyer who perceived the conflicts of interest and who alerted the trial judge. This Court reversed not because joint representation should have alerted the trial judge but because the ethical obligation of the lawyer, satisfied by notice of conflict, became the proof of conflict. Rule 44c does nothing to enforce the ethical obligation, which clearly ought to be enforced in every ca e. A case by ca:e inquiry into potential conflicts will continue to be an ineffectual method of assuring an accused, the court and society of the undivided fidelity of an attorney to his client.

Although it may well be said that an accused has the right to choose his attorney and thereafter waive any conflict, such right of choice should never result in an accused, in effect, dictating that a court compromise its adversary system so as to accomodate him. Such compromises should not be gained under the guise of right to counsel.

Joint representation is and always will be an accommodation to the defense bar. The risk that constitutionally effective representation may continue to be undercut by joint representation is an unacceptable risk. It is a risk that should not be shouldered by defendants, by lawyers, by judges, or by society as a whole. The time has come for a rule promulgated by this Court prohibiting multiple representation.

CONCLUSION

For all of the foregoing reasons, it is most respectfully submitted that the judgment of the Third Circuit Court of Appeals be affirmed.

Respectfully submitted,

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